United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

314

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,555

MICHAEL E. WORKCUFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United
States District Court
for the District of
Columbia

Jerry C. Straus
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(Appointed by this Court)
1616 H. Street, N.W.
Washington, D. C.

August 14, 1969
WILKINSON, CRAGUN & BARKER
Kenneth F. Tworoger
Of Counsel

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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a. this was a clear violation of the requirements of the Court Reporters Act, 28 U.S.C. § 753;

b. counsel newly appointed to handle this appeal in the absence of a transcript of the omitted portion of the charge, is unable to adequately determine whether "plain errors or defects" were present in the instructions as finally given;

c. it appears, according to notes made by the prosecuting attorney, at least one error was committed by the district court in the portion of the charge that was not transcribed.

2. Whether the district court erred in refusing defendant an instruction on unlawful entry (22 D.C.C. § 3102) as a lesser-included offense of burglary (22 D.C.C. § 1801(a)) when there was evidence in the case to support the inference that defendant was present in the apartment in question,

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This case has not been before this court previously.

against the authority of the lawful occupants, but without having the requisite criminal intent for a burglary conviction.

3. Whether, on the evidence presented, there was sufficient corroboration of corpus delicti of the alleged indecent liberties offense to allow this count to go to the jury.

REFERENCES TO RULINGS

The district court made no rulings which set forth the basis of the judgment presented for review by this court.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,555

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant (hereinafter defendant) was charged by indictment with burglary in the first degree,[1/] assault with intent to commit carnal knowledge,[2/] and taking indecent liberties with a minor.[3/] The second count, assault with intent to commit carnal knowledge, was dismissed because no evidence was adduced to support it. (Tr. Vol. 2, 60.)[4/] Defendant was convicted of the burglary and indecent liberties counts and was sentenced to a term of two to seven years.

On September 17, 1968, after pleading not guilty to all counts, defendant was tried by jury in the United

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1/ 22 D.C.C. §1801(a).
2/ 22 D.C.C. §501.
3/ 22 D.C.C. §3501(a).
4/ There are three volumes of transcript in this case; Volumes One and Two both begin with page one and therefore transcript references to Volume Two will be designated as follows: "Tr. Vol. 2." Volume Three begins with page 1001 and references will be made to the pages therein without further identification.

States District Court for the District of Columbia, Chief Judge Edward M. Curran, presiding. Defendant was represented by counsel appointed by the court, Eugene J. Fitzpatrick (Appendix A., infra, p. 29).

At the trial, the evidence introduced by the Government, as indicated by the official transcript of the proceedings, was as follows.

During the evening of January 27, 1968, defendant was present, by invitation, in the apartment in which the alleged offenses were supposed to have taken place. (Tr. 64, 66-88.) Present in the apartment during the evening in question were the several children of Mr. and Mrs. Lane, ranging in age from about 15 to infancy, and two girlfriends of the eldest daughter Rose (Velma Hobbs and a girl named Gwendolyn). (Tr. 63-66.) The complainant,Patricia Miller , (aged 10) was present. (Tr. 6.) Defendant lived with his mother in another apartment in the same building as the Lane apartment, (Tr. 96.) and was known to the Lane children. (Tr. 67.) At the time defendant was invited into the Lane apartment, the eldest daughter and her two friends were socializing and drinking rum (Tr. Vol. 2, 7); the younger children were sleeping. (Tr. 66.) Defendant conversed with the older girls for a short while and then left the apartment when they did. (Tr. 97.) The elder girls went to get something to eat (Tr. 101); defendant left with his companion

who came to meet him to get some beer. (Tr. Vol. 2, 72.) The time at which defendant and the girls left the apartment was shortly before midnight. (Tr. 68-69.)

According to the Government's evidence, approximately one hour later, the eldest Lane daughter, Rose, and her friend, Velma Hobbs, returned to the apartment. (Tr. 71-74.) Both testified that they found 10-year old Patricia awake and emotionally upset. (Tr. 74, 115.) Rose and Velma testified that Patricia stated that defendant had tried to pull down her underpants while they were absent from the apartment. (Tr. 75, 115.) Rose also testified that Patricia told them that defendant had tried to smother her, put a pillow over her head and picked her up and threw her on the floor. (Tr. 75.) Velma testified she heard Patricia say that defendant had beaten her and tried to smother her. (Tr. 115.)

Patricia, herself, did not testify at the trial, having been found by the court to be incompetent. (Tr. 40, 53.) Her sister's testimony, and that of the sister's friend, was admitted, over objection, as hearsay, on the theory that Patricia's story was a spontaneous utterance. (Tr. 62,63.)

Virginia Lane, twelve-year old sister of Patricia, who apparently had been sleeping in another room at the time of the incident charged, (Tr. Vol. 2, 32.) testified

to the effect that she heard Patricia cry out for her older sister, Rose, (Tr. Vol. 2, 30), and that she woke up and saw defendant running out of the door. (Tr. Vol. 2, 31, 49.)

Other evidence introduced by the Government included the testimony of one of the police officers who investigated the incident who testified that Patricia, at the time, appeared upset, her face was puffy and red around her left eye and cheek, and her eye was bloodshot. (Tr. Vol. 2, 53.) A police detective who photographed Patricia the next morning testified that her eye was bloodshot, as shown by photographs which were introduced as Government Exhibits 1, 2 and 3. (Tr. Vol. 2, 59.)

After the Government's presentation, defendant's counsel moved for judgment of acquital which motion was denied. (Tr. Vol. 2, 61.) Defendant then introduced his evidence which consisted, in chief, of his testimony and that of his companion, Roger Tyler, that they had been constantly together, outside of the Lane apartment, from the time defendant left the Lane apartment until defendant was arrested. (Tr. Vol. 2, 79-80; 134-137.)

After the closing arguments of counsel were had, the court delivered its instructions to the jury. (Tr. 1045-1065.)

The court refused to instruct the jury, at the request of defense counsel that appellant could be convicted of unlawful entry as a lesser-included offense of burglary. (Tr. 1007, 1063.) The court, apparently, adopted

the argument of the prosecuting attorney that the lesser-included offense instruction was not required because the accused's " ... only defense is that he didn't enter the place at all" and that " ... he is hardly entitled to argue that he merely unlawfully entered without an intent to commit a crime or against the authority of someone within the place." (Tr. 1006.)

The court went on to instruct the jury as to the alternative verdicts it could find as follows:

> You can return a verdict of guilty as indicted under count 1; you may return a verdict of guilty as indicted under count 3. You may return a verdict of not guilty under count 1; and not guilty under count 3, or you may return a verdict of guilty under count 1, and guilty of simple assault under count 3, all depending on how much weight you give the evidence. (Tr. 1064-65.)

After the jury was instructed and excused, it was recalled to the courtroom and given some additional instructions. These instructions were delivered without a court reporter being present and were not transcribed. This event is confirmed by the affidavits of trial counsel lodged with this court as a supplement to the record in this case pursuant to stipulation of the parties and reproduced in Appendix A, infra, pp. 25-31.[5/]

5/ On May 2, 1969 defendant filed a motion with the district court, pursuant to the provisions of Rule 10(e), Federal Rules of Appellate Procedure, to have the record made to conform to the truth to show that Chief Judge Edward M. Curran delivered part of his charge to the jury in this case out of the presence of the court reporter. (continued on following page)

While neither trial counsel has any independent recollection of the precise nature of the additional instructions, the prosecuting attorney has averred on the basis of notes he took at the time (reproduced, infra, p.31) that the trial judge's additional instructions were as follows:

> If you find the defendant not guilty of both counts, that ends the case. If you find the defendant not guilty of count one, you must return a verdict of not guilty as to count three. If you find the defendant guilty of count one, you may find him guilty or not guilty of count three, or guilty of simple assault.

On September 26, 1968 defendant filed a motion for new trial (which was denied by an undated order of

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5/ (Continued from preceding page)
On May 7, 1969, Edward T. Miller, former Assistant United States Attorney, who handled the prosecution of this case for the Government, wrote to Frank Q. Nebeker, former Chief, Appellate Division, Office of the United States Attorney, and confirmed this occurrence.

Subsequent to the filing of the aforementioned motion, counsel was contacted by Roger E. Zuckerman of the United States Attorney's Office, and it was agreed that a conference should be held on this matter before Chief Judge Curran, in Chambers, to be attended by former United States Attorney Edward T. Miller.

Because of the illness of Judge Curran, it was not possible to schedule this conference until Tuesday, June 17, 1969. At this conference it was agreed that Mr. Zuckerman would prepare a stipulation supplementing the record on appeal to include the affidavit of Eugene J. Fitzpatrick, appointed counsel for defendant in the district court, and an affidavit to be prepared by Mr. Miller, both affidavits recounting the circumstances of the above-described occurrence. Mr. Miller's affidavit and the stipulation were filed with the district court on August 8, 1969 and were received by counsel for defendant on August 9, 1969. A subsequent stipulation was filed by parties on August 11, 1969 for the transmittal of Mr. Fitzpatrick's affidavit and Mr. Miller's notes to this court, also to be lodged as a supplement to the record in this case.

Failure to comply with the provisions of the Court Reporters Act has provided grounds for reversal of convictions in a variety of circumstances. Fowler v. United States[11] involved a case where the closing arguments of trial counsel were not recorded pursuant to local practice. The Fifth Circuit Court of Appeals, however, held that the Court Reporters Act, supra , was controlling and that:

> The Congress has directed that a court reporter shall record all proceedings in criminal cases had in open court. 28 U.S.C.A. § 753(b). The requirement is mandatory and without a transcript of the argument of counsel we are unable to determine whether the United States Attorney made such prejudicial comment as to require reversal. This being so, it follows that a new trial must be had. Therefore, the judgment of conviction and sentence must be reversed and the case remanded. (Emphasis supplied.)[12]

In Stephens v. United States,[13] the Fifth Circuit again summarily held that the trial court committed reversible error "when it failed to require the court reporter to record certain proceedings had in open court, mainly, the examination of the venireman and the arguments of counsel to the jury."[14] As the court stated:

> The Act is mandatory in its requirements, and it has been held that its very purpose was to satisfy "the long-felt need for a verbatim record of all court proceedings, particularly in criminal cases ***". (Citing Poole v. United States, 102 U.S. App. D.C. 71; 250 F.2d 396, 399 (1957)) .[15]

11/ 310 F.2d 66 (5th Cir. 1962).
12/ Id. at 67.
13/ 289 F.2d 308 (5th Cir. 1961).
14/ Id. at 309.
15/ Id.

The court concluded:

> Since the failure of the court reporter to observe the terms of the statute is undisputed and the result is that a full transcript is not available to us, we do not see how we can, under Rule 52(a), F.R. Cr. P., 18 U.S.C.A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless. This conclusion seems to be in line with whatever jurisprudence is available on the subject.16/

There is authority to the effect that it is not prejudicial error, per se, to fail to report some parts of a criminal proceeding . In the absence of a claim of specific prejudicial error in the omitted portion of the proceedings,17/ courts have refused to reverse where there was failure to record such matters as side-bar conferences between court and counsel,18/ closing arguments of counsel,19/ or pre-trial hearings.20/

But such cases all involve much less critical parts of a criminal proceeding than the charge to the jury and are distinguishable for that reason. The rule which has been followed with respect to such matters as side-bar

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16/ Id.

17/ As we demonstrate infra p.16 error did occur in the portion of Judge Curran's charge delivered out of the presence of the court reporter.

18/ Edwards v. United States, 374 F.2d 24, 26 (9th Cir. 1967); cert. denied, 389 U.S. 850.

19/ Casalman v. Upchurch, 386 F. 2d 813 (5th Cir. 1968); compare Brown v. United States, 314 F.2d 293, 295 (9th Cir. 1963), where the court refused to reverse the conviction for failure to record the closing arguments of counsel but vacated the judgment and remanded the case "for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments."

20/ Burns v. United States, 323 F.2d 269, 270 (5th Cir. 1963); cert. denied,376 U.S. 907.

conferences cannot apply to the judge's charge to the jury where he speaks as the "representative of the law and its authorized expositor."[21] The charge to the jury is " ... the most important function that the judge has to perform in a jury trial, and one of the most difficult in the whole range of his judicial duties." (Emphasis supplied.)[22]

This court cannot properly exercise its reviewing function where, as here, the clear command of the Court Reporters Act has been flouted with respect to the most crucial portion of the proceedings. This is especially true in a case such as this one, where the defendant has counsel appointed on the appeal who did not handle the proceedings before the district court.

In Hardy v. United States[23] the defendant, as in the present case, was an indigent who had been convicted at trial. Subsequent to the trial, the Court of Appeals of the District of Columbia Circuit, as in the present case, appointed different counsel to represent the defendant on appeal. The defendant's counsel moved for a transcript of the entire proceedings. The court of appeals denied the

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21/ Remarks of Judge Morris Soper, before the Judicial Conference at Asheville, N.C., June 21, 1940, 1 F.R.D. 540.
22/ Id.
23/ 375 U.S. 277 (1964).

motion but allowed the defendant a partial transcript prepared at Government expense relating to the errors alleged by the defendant pro se.[24]

The United States Supreme Court reversed the decision of the court of appeals. The Court noted:

> A court-appointed counsel who represents the indigent on appeal gets at public expense, as a minimum, the transcript which is relevant to the points of error assigned.... But when, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. For Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.[25]

The Court concluded that the duty of defendant's counsel on appeal could not "be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." (Emphasis supplied.)[26]

In the present case, defendant was not and cannot be provided an entire transcript. A portion of the instructions

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24/ Id. at 278.
25/ Id. at 279-80 (cites omitted.)
26/ Id. at 282.

by which the trial judge charged the jury was not included with the transcript which defendant did receive. In Hardy, appellate counsel could not review the trial judge's charge because he was not provided with a complete transcript. In the present case, the instructions in question were never reported. In both cases, the result is the same--neither defendant's newly appointed counsel on appeal nor this court is adequately able to determine whether "plain errors or defects" were present in the instructions as finally given.[27/]

It should be noted that in United States v. Sigal[27a/] the court rejected the contention that Hardy compelled reversal of the conviction because of the failure of the court reporter to record voir dire. The court relied on the fact that, unlike the present case, the attorney of record for defendant at the trial was still his attorney of record on the appeal.[27b/] Judge Biggs, dissenting, would have reversed.[27c/]

27/ Compare Tate v. United States, 359 F.2d 245, 253 (1966), where this court held that transcripts must be provided for indigent defendants who appeal from the D.C. Court of General Sessions to the D.C. Court of Appeals:

> Translating this requirement into specific guidelines we note that where counsel on appeal is not the same as trial counsel, a complete transcript is necessary. (Citing Hardy v. United States, supra.)

27a/ 341 F.2d 837 (3rd Cir. 1965); cert. denied, 382 U.S. 811.

27b/ Id. at 839.

27c/ Id. at 846-51.

B. If the prosecuting attorney's notations of the trial court's charge are accurate, error occurred in the portion of the charge delivered out of the presence of the court reporter.

While,as shown, it was reversible error per se for the court to reinstruct the jury out of the presence of the court reporter, the defendant claims that error occurred in the portion of the charge that was not recorded.

As stated previously, the attorneys involved in defendant's trial do not recollect the substance of the trial judge's final, unrecorded instructions to the jury. The prosecuting attorney, however, has disclosed that he took coded or shorthand notes which, it is claimed, had the effect of paraphrasing the unrecorded instructions. According to Mr. Miller's affidavit of July 24, 1969 (Appendix A, infra, p.26-27), the judge recharged the jury as follows:

> If you find the defendant not guilty of both counts, that ends the case. If you find the defendant not guilty of count one, you must return a verdict of not guilty as to count three. If you find the defendant guilty of count one, you may find him guilty or not guilty of count three, or guilty of simple assault.[28]

28/ Defendant, of course, does not accept the prosecuting attorney's interpretation of these coded notes as an accurate recounting of the substance of the unreported instructions especially since the prosecuting attorney does not purport to have any independent recollection of this matter. Such a method of providing defendant with a record of such a critical stage of the proceedings is an entirely
(continued on following page)

If it be assumed that the district court's final instructions were as recorded in the prosecuting attorney's notes, these instructions were erroneous.

The judge correctly instructed the jury that they could convict defendant on the burglary count (count 1) only if they believed he entered the apartment with the specific intent to commit an offense therein and that they could infer this intent from surrounding circumstances. (Tr. 1055.) But the jury was not required to make that inference of specific intent. Even if it believed that defendant committed the indecent liberties offense, the jury could have had a reasonable doubt that defendant had the necessary specific criminal intent to commit burglary when he entered the apartment.

However, the judge failed to recognize this and did not instruct the jury that they could find the defendant guilty of count 3 (indecent liberties) and not guilty of count 1 (burglary). On the contrary, the prosecuting attorney's affidavit indicates that the judge instructed

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28/ (Continued from preceding page)
unsatisfactory substitute for a verbatim transcript of the proceedings. As the Supreme Court noted in Hardy v. United States:

> Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen - let alone assessed - without reading an accurate transcript. Particularly is this true of questions relating to evidence or to the judge's charge; .... (375 U.S. at 281 n.3, quoting from Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 792-93 (1961). (Emphasis supplied)).

the jury that if they found him not guilty of burglary (count 1), they must find him not guilty of the indecent liberties charge (count 3). While at first glance this instruction might seem to be favorable to the defendant, its effect was actually highly prejudicial to defendant. It amounted to an instruction that a not guilty verdict on the burglary count was inconsistent with a guilty verdict on the indecent liberties count. This would have been understood by the jury to mean that it did not have the option to find defendant not guilty of burglary (the greater offense) if they desired to find him guilty of the indecent liberties count (the lesser offense).

While other errors not noted by the U.S. Attorney may have occurred, the U.S. Attorney's notes make it appear that this one particular error did occur in the omitted portion of the record. Since it cannot now ever be known exactly what the judge's final instructions to the jury were, this court is unable to rule on this error claimed and the appropriate course is to reverse and remand the case for a new trial on this point.[29/]

29/ Calhoun v. United States, 384 F.2d 180, 184 (5th Cir. 1967).

II. The District Court Erred in Refusing to Grant Defendant's Request for An Instruction on An Unlawful Entry As A Lesser-Included Offense of Burglary

The trial court erred in refusing the timely request of defense counsel (Tr. 1005) for an instruction on unlawful entry (22 D.C.C. § 3102) as a lesser-included offense of burglary (22 D.C.C. § 1801(a)).

The principles applicable to such an instruction were outlined by the Supreme Court in Sansone v. United States[30] as follows:

> Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the "defendant may be found guilty of an offense necessarily included in the offense charged." Thus, "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it ... [is] entitled to an instruction which would permit a finding of guilty of the lesser offense." Berra v. United States, 351 U.S. 131 (1956).... A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. (Emphasis Added.)[31]

This test was clearly met in this case. Burglary under 22 D.C.C. § 1801 requires an entering, with or without breaking, of an occupied dwelling, plus an intent to commit any criminal offense. Unlawful entry under 22 D.C.C. § 3102

30/ 380 U.S. 343 (1965).
31/ Id. at 349-50.

requires proof of entry against the authority of the lawful occupant, with no requirement of intent to commit a criminal offense.

It will be recalled that Virginia Lane testified she saw defendant in the Lane apartment at the time of the alleged occurrence. (Tr. Vol. 2, 31, 49.) The jury could have believed this testimony yet failed to give credence to the hearsay testimony of the other witnesses relating to the indecent liberties charge. Accordingly, on the evidence in this case the jury could have made the inference that defendant entered the Lane apartment against the authority of the lawful occupants but without having the requisite criminal intent for a burglary conviction. Whether defendant had the requisite intent was a"disputed factual element," within the ruling of Sansone, which was not required for conviction of the lesser offense of unlawful entry.

It should be noted that there is no merit to the argument made by the prosecuting attorney that the unlawful entry instruction was not required because inconsistent with the defense of alibi, i.e., defendants claim that he was not in the apartment at all during the time the alleged offenses were committed. (Tr. 1006.) The fact that the defendant asserted he was innocent of any crime at all does not preclude a claim that the evidence

raised an issue as to whether a lesser-included offense had been committed, as this court noted in Broughman v. United States.[32] "[A] defendant is entitled to an instruction on any issue fairly raised by the evidence, whether or not consistent with the defendant's testimony or the defense trial theory."[33] Defendant was not required to assert that he was guilty of the lesser-included offense in order to get the denied instruction. Since, as noted, the evidence raised the issue of unlawful entry it was error for the district court to deny the instruction.

32/ 124 U.S. App. D.C. 54, 55; 361 F.2d 71, 72 (1966).

33/ Womack v. United States, 119 U.S. App. D.C. 40; 336 F.2d 959 (1964). See also Belton v. United States, 127 U.S. App. D.C. 201, 206; 382 F.2d 150, 155 (1967).

III. The Evidence Did Not Contain Sufficient Corroboration of "Corpus Delicti" to Support The Conviction. (Tr. 40, 53, 62-63, 71-75, 115; Tr. Vol. 2, 31-32, 49, 53, 59)

Conviction of a sex offense, such as that involved in the present case, requires corroboration of the complainant's accusation. Without such corroboration, the conviction will not stand.[34/] The corroboration requirement is the result of the traditional skepticism of the courts toward accusations of sex offenses.[35/] This skepticism, in turn, is the result of the recognition that such accusations have a tendency, for various reasons, to be unreliable,[36/] especially when made by a young child.[37/]

In order to satisfy the requirement of corroboration it is essential that the evidence must establish corpus delicti.[38/] That is, there must be sufficient evidence to

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34/ Coltrane v. United States, ___ U.S. App. D.C. ___; ___ F.2d ___, No. 21, 843, May 23, 1969; Jones v. United States, 97 U.S. App. D.C. 291, 231 F.2d 244 (1956).

35/ Wilson v. United States, 106 U.S. App. D.C. 226, 271 F.2d 492 (1959).

36/ Coltrane v. United States, supra, note 34, slip. op. p. 6.

37/ Wilson v. United States, supra ,106 U.S. App. D.C at 227; 271 F.2d at 493.

38/ Coltrane v. United States, supra, note 34, slip. op. p. 8; Wilson v. United States, supra., 106 U.S. App. D.C. at 226, 271 F.2d at 492; Jones v. United States, 97 U.S. App. D.C. at 292, 231 F.2d at 245.

corroborate that the crime charged was, in fact committed by somebody.[39] Second, it is ordinarily essential that the evidence also corroborate the "identity of the perpetrator."[40]

In the instant case there was need for stringent enforcement of this requirement for the Government case rested on the hearsay testimony of the complainant (admitted under the excited utterances exception to the hearsay rule) and the jury had no opportunity to assess the complainant's credibility.

Aside from the hearsay statements, there was no evidence in the record to corroborate the charge that defendant took or attempted to take "indecent liberties" with the complainant.[41]

It is true that Virginia Lane testified that she saw the defendant running out of the apartment at the time the alleged offense supposedly occurred. (Tr. Vol. 2, 31, 49.) This testimony apparently weighed heavily with the trial judge. The record discloses that defense counsel sought dismissal of the indecent liberties charge on the ground that the corroboration was insufficient. (Tr. Vol. 2, 60.)

39/ Jones v. United States, 97 U.S. App. D.C. at 292, 231 F.2d at 245.

40/ Coltrane v. United States, supra, note 34. Slip. op. p. 8.

41/ It is well established that the"corpus delicti" in a case such as this cannot be established by the alleged victim's spontaneous declaration. Wilson v. United States, 106 U.S. App. D.C. at 227; 271 F.2d at 493; Fountain v. United States, 98 U.S. App. D.C. 389, 391; 236 F.2d 684, 686 (1956).

The court summarily denied the motion stating that "certain circumstances" must be corroborated and that "the girl [complainant's twelve-year old sister, Virginia] put him in the apartment." (Tr. Vol. 2, 61.)

If the testimony of Virginia Lane referred to by the trial judge was sufficient corroboration for anything, it related to defendant's identity as the perpetrator of the alleged crime, not to the fact that the offense charged was ever committed. In Coltrane v. United States,[42] this court held that charges of sex offenses were insufficiently corroborated to be sent to the jury, even though it had been well established that the complainant was at the defendant's house at the times in which the alleged offenses were to have occurred.

In Wilson v. United States,[43] the defendant's presence at the scene during the time of the alleged offense was proven. The court stated, "Appellant was guilty if anyone was, for he alone was with the child at the time of the alleged offense."[44] The court reversed the conviction after continuing, "But there was no evidence of any sort, except the testimony of the child herself, that anyone took indecent liberties with her."[45]

42/ Supra, note 34.
43/ 226 U.S. App. D.C. 97; 271 F.2d 492 (1959).
44/ Id.
45/ Id.

A situation very similar to the present one was involved in Jones v. United States,[46] where in a prosecution for taking indecent liberties with a five-year old girl, the statement of the girl as to what the defendant did to her was admitted under the excited utterances exception to the hearsay rule. The court held:

> The statement of the child to the mother was admissible as a spontaneous declaration; but since it was the only evidence of the occurrence, the child herself not being eligible as a witness, it was insufficient to support the verdict. For one of the requisite elements with respect to evidence in a case such as this is the establishment of the corpus delicti.[47]

The court pointed to the fact that there was no injury to the child shown from the alleged sexual acts and distinguished the case of Snowden v. United States[48] where, " ... the abuse of the child was clearly demonstrated by injuries to the private parts of the child; thus the corpus delicti was established."[49]

While there was evidence of injury to the complainant's face and eye in this case, this in no way established that the charged indecent liberties (pulling down of Patricia Miller's underpants) in fact occurred. As noted above, the only evidence in the record of that occurrence are the uncorroborated hearsay statements made by Patricia and reported by various witnesses. Standing alone, these statements did not sufficiently establish corpus delicti.

46/ Supra, note 34.
47/ 97 U.S. App. D.C. at 292; 231 F.2d at 245.
48/ 2 App. D.C. 89.
49/ 97 U.S. App. D.C. at 293; 231 F.2d at 246.

CONCLUSION

As we have shown, there was insufficient corroboration of the third count of the indictment (indecent liberties) to allow this count to go to the jury. In addition, the district court erred in failing to give an instruction on a lesser-included offense (unlawful entry) in the first count of the indictment (burglary). Therefore, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded to the district court with directions to enter a judgment of acquittal on the third count of the indictment, and to grant defendant a new trial on the first count of the indictment.

In the alternative, since we have shown that prejudicial error occurred when part of the district court's charge to the jury was delivered out of the presence of the court reporter and was not transcribed, it is respectfully submitted that the conviction should be reversed and the case remanded to the district court with directions to grant defendant a new trial on both counts of the indictment.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr. No. 274-68
	:	
MICHAEL E. WORKCUFF	:	

STIPULATION

The parties hereby stipulate that the attached affidavit be transmitted to the Court of Appeals and lodged there as a supplement to the record in this case, D.C. Cir. No. 22,555.

/s/ ROGER E. ZUCKERMAN
ROGER E. ZUCKERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Stipulation has been mailed to attorney for appellant, Jerry C. Straus, Esq., 1616 H Street, N.W., Washington, D.C., this 8th day of August, 1969.

/s/ ROGER E. ZUCKERMAN
ROGER E. ZUCKERMAN
Assistant United States Attorney

A F F I D A V I T

DISTRICT OF COLUMBIA, SS.:

Edward Terhune Miller, being first duly sworn on oath according law, deposes and states as follows:

1. That he was an Assistant U. S. Attorney and Trial Counsel who prosecuted the case of United States v. Michael Workcuff, Criminal No. 274-68, in the United States District Court for the District of Columbia at a trial to a jury before Chief Judge Edward M. Curran.

2. That at the conclusion of the evidence the Trial Court instructed the jury concerning the applicable principles of law.

3. That while he has no reliable independent recollection of the precise circumstances relating to an appellate claim by the defendant that the jury, having been instructed and excused, was recalled to the courtroom for further instructions which were given without a court reporter being present, the affiant states that he made a written memorandum in his customary abbreviated form which records certain additional or clarifying instructions given by the Court, without a reporter being present, after recalling the jury. This memorandum, which was retained in the file of the case, is annexed hereto by copy as Exhibit A.

4. The memorandum records that at 12:18 p.m., there was a reinstruction of the jury by the Court without a reporter being present. The introductory explanation by the Court was so brief that the affiant was unable to record the last portion of it before he began recording the substance of the instruction, but the Court did use the words, "I don't want you to be. . ." and to the best of the affiant's recollection, the Court continued its introduction by explaining that it did not want the jury to be confused or mistaken in regard to the verdicts available to it. That on the basis of his notes, affiant declares that the Court then proceeded to instruct the jury in essentially the following words:

If you find the defendant not guilty of both counts, that ends the case. If you find the defendant not guilty of count one, you must return a verdict of not guilty as to count three. If you find the defendant guilty of count one, you may find him guilty or not guilty of count three, or guilty of simple assault.

5. To the best of the affiant's present recollection, this instruction was made either at the request of the Government or jointly with the defendant in order to clarify the prior instructions of the Court. The request was made after reflection but promptly in chambers after the jury had been excused to deliberate.

6. Affiant does not recall nor did he make any notation in his memorandum that the defendant raised any objection either to the instruction or to the absence of the reporter at the time that this instruction was given.

Edward Tarhune Miller

Edward Tarhune Miller

Subscribed and sworn to before me this 24th day of July, 1969.

Muriel Rubenstein

Notary Public

My commission expires: Sept 30, 1969

FILED
8-11-69

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Cr. No. 274-68

MICHAEL E. WORKCUFF :

STIPULATION

The parties hereby stipulate that the attached affidavit of Eugene J. Fitzpatrick and notations of Edward T. Miller be transmitted to the Court of Appeals and lodged there as a supplement to the record in this case, D.C. Cir. No. 22,555.

Jerry C. Straus
JERRY C. STRAUS
Counsel for Appellant in No.22,555

Roger E. Zuckerman
ROGER E. ZUCKERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Stipulation was hand delivered this 11th day of August, 1969, to the Office of the United States Attorney, United States Court House, Washington, D. C.

Jerry C. Straus
JERRY C. STRAUS
Counsel for Appellant in No.22,555

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division

UNITED STATES OF AMERICA

v.

Criminal No. 274-68

MICHAEL E. WORKCUFF

Defendant

AFFIDAVIT

I, EUGENE J. FITZPATRICK, a member of the Bar of the United States District Court for the District of Columbia, hereby state that, in said capacity, I was appointed by the said United States District Court to represent the indigent defendant, Michael Workcuff, in connection with the criminal indictment returned against the said Mr. Workcuff by the Grand Jury in and for the District of Columbia. I further state that the matter came on for trial in the United States District Court for the District of Columbia, the Honorable Edward M. Curran, presiding, resulting in a conviction, after jury trial, of the counts of taking indecent liberties with a minor child and first degree burglary. I further state that, after instructions had been given the Court to the jury and after the jury had retired to commence deliberations, counsel for the Government and your affiant, approached the trial judge in his chambers with a request for additional clarification to the jury of the said charges. The jurors were recalled to the box and given additional instructions, the precise nature of which your affiant can no longer recollect. At the time these additional instructions were given to the jury, no court reporter was present to record the said instructions. At that time, neither counsel for the Government, nor your affiant, directed to the Court's attention the absence of the court reporter.

I state that the matters and facts set forth in this affidavit are true to the best of my understanding and belief.

Eugene J. Fitzpatrick

STATE OF MARYLAND, COUNTY OF MONTGOMERY, to wit:

I hereby certify that on this 24th day of April, 1969, before me, a Notary Public in and for the State and County aforesaid, personally appeared

EUGENE J. FITZPATRICK, who, being first duly sworn, states that the matters and facts set forth in the foregoing Affidavit are true to the best of his understanding and belief.

Jean B. Johnson

Jean B. Johnson, Notary Public

My commission expires: July 1, 1969

- 30 -

NOTATIONS OF EDWARD T. MILLER

12:18 Remarks w/o graphs

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NG b.H — ends case.
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& B & SA —

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,555

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL E. WORKCUFF, APPELLANT

Appeal From the United
States District Court
for the District of
Columbia

Jerry C. Straus
Counsel for Appellant
(Appointed by this Court)
1616 H. Street, N.W.
Washington, D.C.

October 16, 1969
WILKINSON, CRAGUN & BARKER
Kenneth F. Tworoger
Of Counsel

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MISCELLANEOUS

UNITED STATES COURT OF APPEALS FOR
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No. 22,555

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL E. WORKCUFF, APPELLANT

Appeal From the United
States District Court
for the District of
Columbia

REPLY BRIEF FOR APPELLANT

I. The District Court Erred in Reinstructing the Jury Out of the Presence of the Court Reporter. [1/]

A. It was error per se for the district court to reinstruct the jury out of the presence of the court reporter.

Defendant's main brief (p. 10) recognized that there is a line of authority holding it is not error per se to fail to record some parts of a federal district court criminal

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1/ The Government inaccurately states (brief, p.6) that the reinstruction was made at the request of defendant's counsel. To the contrary, the reinstruction was apparently made at the request of both trial counsel. (See Appendix A, defendant's main brief, pp. 27, 29.)

proceeding such as side bar conferences, closing arguments of counsel, or pre-trial hearings.[2/] As to these matters, the rule has been that it is incumbent on the defendant to make claim of some prejudicial error in the portion of the proceeding that is not transcribed.

The Government (brief, pp. 7-8) relies on these cases but fails to answer defendant's contention (defendant's brief, p. 11) that this line of authority is distinguishable from the case presented here. None of the cases relied upon by the Government involved a failure to record part of the judge's instructions to the jury. As far as counsel is aware, the present case is one of first impression in the federal courts. The rule announced in Edwards v. United States[3/] and other similar cases should not be followed where, as here, neither appellate counsel nor the appellate court can determine what occurred at the penultimate moment of the trial--the trial judge's charge to the jury.

The Government also sidesteps defendant's argument based on the decision of the Supreme Court in Hardy v. United States.[4/] Defendant's main brief (pp. 12-13) showed that Hardy dealt with the need of supplying counsel appointed

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2/ See Edwards v. United States, 374 F.2d 24, 26 (9th Cir. 1967), cert. denied, 389 U.S. 850; Casalman v. Upchurch, 386 F.2d 813 (5th Cir. 1968); Burns v. United States, 323 F.2d 269, 270 (5th Cir. 1963), cert. denied, 376 U.S. 907; Brown v. United States, 314 F.2d 293, 295 (9th Cir. 1963).

3/ Supra. n.2.

4/ 375 U.S. 277 (1964).

to represent an indigent on appeal with a transcript of the proceedings. The Supreme Court ruled that counsel newly appointed on appeal, in order to discharge his duty to determine whether there had been "plain errors or defects" in the trial, had to have available a transcript of the testimony and evidence and the court's charge to the jury.[5/] Defendant argued that the command of Hardy was frustrated below by the failure to record the trial judge's final instructions. Here, as in Hardy, newly appointed appellate counsel is unable to determine whether "plain errors or defects" were present in the instructions as finally given.

The Government's answer to this is simply to ignore the Supreme Court's stated rationale for its decision in Hardy; namely, that appointed counsel could not discharge his duty to glean the record for "plain errors or defects" unless he was furnished with a transcript of "the court's charge to the jury" and other critical parts of the trial.[6/] As the Government points out, this court noted in Tate v. United States[7/] that Hardy was concerned with "the need for avoiding arbitrary discrimination in treatment of defendants whether based on their resources or the court where they are tried." But not every discrimination is significant and the Supreme

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5/ Id. at 279-80, 282.

6/ Id. at 282.

7/ 123 U.S.App.D.C. 261, 269, 359 F.2d 245,253 (1966).

Court in Hardy determined that the discrimination there involved (failure to provide a transcript since the defendant could not pay for it) required reversal because this frustrated the defendant's rights under Rule 52(b) of the Federal Rules of Criminal Procedure. As developed elsewhere, the Supreme Court reasoned that the right to notice plain errors or defects was rendered illusory if a full transcript of the judge's charge and other critical parts of the proceeding were not made available to appointed counsel on appeal. Defendant's rights in the instant case under Rule 52 are rendered equally illusory by the absence of a transcript of the trial judge's final charge to the jury.[8/]

8/ This court did not rule in Tate, as the Government suggests, that the rationale of Hardy only applied in cases where trial court proceedings have been recorded. The Government quotes a portion of this court's opinion on p. 7 of its brief, omitting critical language. The full statement this court made is as follows:

> "We further hold that the standards announced by the Supreme Court [in Hardy] with respect to provision of transcripts to indigent appellants must be applied by the D.C. Court of Appeals and Court of General Sessions in all cases in which the trial court proceedings in the United States branch have been recorded by a court reporter." (Tate, supra. p.3, n.7.)

In the above statement this court was only recognizing that, unlike proceedings in the federal district court governed by the Court Reporters Act, criminal proceedings in the Court of General Sessions are not all required by law to be transcribed. The court recognized constitutional difficulties in this scheme which were obviated by its construction of the relevant statutes. (See 359 F.2d at 255.)

B. Error occurred in the portion of the trial court's charge delivered out of the presence of the court reporter.

Defendant's main brief showed that the portion of the trial court's charge to the jury, delivered out of the presence of the court reporter contained highly prejudicial error.[9/] As developed there in detail (pp. 14-16) the final instruction on alternative verdicts included a charge that a not guilty verdict on the burglary count was inconsistent with a guilty verdict on the indecent liberties count. This would have been understood by the jury to mean that it did not have the option to find defendant not guilty of burglary if it desired to convict him of the indecent liberties charge.

The Government does not attempt to demonstrate that this portion of the charge was correct. It rests rather on the familiar principle that the judge's charge must be viewed as a whole to determine whether it was likely that the jury was misled. United States v. Thurman.[10/] The Government asserts that, viewing the charge given below as a whole, there was no chance that the jury was misled.

Defendant strongly disagrees. First, defendant does not, as the Government asserts (brief, p. 10), admit the correctness of the part of the charge which was transcribed. The statement referred to by the Government,

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9/ This was based on the shorthand notes taken by the prosecuting attorney.

10/ D.C. Cir. No. 22,363, decided July 7, 1969, slip. op. at 1-2.

appearing on p. 15 of defendant's main brief, was only that the trial judge's charge was correct on the elements of the burglary count needed for conviction. (See Tr. 1055.)

Defendant has not previously commented on the correctness of the judge's original instructions to the jury on possible alternative verdicts. This charge was as follows:

> "You can return a verdict of guilty as indicted under count 1; you may return a verdict of guilty as indicted under count 3. You may return a verdict of not guilty under count 1; and not guilty under count 3, or you may return a verdict of guilty under count 1, and guilty of simple assault under count 3, all depending on how much weight you give the evidence." (Tr. 1064-65)

In the absence of specific objection from defense trial counsel, this standing alone might not amount to reversible error. However, the charge was certainly confusing in that it failed to clearly specify that the jury could find defendant guilty on one count of the indictment and innocent on the other.[11/]

[11/] This ambiguity could have best been dispelled if the trial court had given an instruction similar to the one suggested for multiple counts in Mathes, Jury Instruction and Forms for Federal Criminal Cases, 27 F.R.D. 39, no. 8.07 (1961):

> "As you have noted, a separate crime or offense is charged in each count of the indictment-information. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged."

This defect was partly cured by the trial judge--according to the U.S. Attorney's notes--when he instructed the jury that if it found defendant guilty of count one (burglary) it could find defendant "guilty or not guilty of count three [indecent liberties]." 12/

But, as pointed out in defendant's main brief (p. 15) the judge never instructed the jury that they could find the defendant guilty of the indecent liberties offense (count three) and not guilty of the burglary offense (count one). Instead, as previously noted, the court gave an erroneous instruction that the jury would have understood to preclude a guilty verdict on the indecent liberties count if it reached a not guilty verdict on the burglary count.

Defendant submits that, viewing the judge's charge as a whole--assuming the correctness of the United States Attorney's notes--it is apparent that the jury was left in serious confusion as to the various alternative verdicts it could reach and with the erroneous impression that it could not find defendant guilty of indecent liberties and innocent of burglary.

12/ App. A, defendant's main brief, p. 27.

II. The District Court Erred in Refusing to Grant Defendant's Request for an Instruction on Unlawful Entry as a Lesser-Included Offense of Burglary.

Defendant does not dispute the Government's assertion (brief,p. 12) that he was only entitled to an instruction on unlawful entry as a lesser-included offense of burglary if there is evidence of the lesser crime in the record.

Defendant's main brief showed (p. 18) that there was independent testimony placing defendant in the Lane apartment at the time of the alleged occurrence. On the basis of this testimony the jury could have well believed that defendant was in the Lane apartment, against authority of the lawful occupants, while having a reasonable doubt that defendant entered the apartment with the intent to commit a criminal offense.

The fact that the jury convicted defendant on the indecent liberties count--encompassing a finding that defendant had the specific intent to commit that offense--does not cure the error as the Government suggests (Government's brief, p. 14). Assuming that defendant had the requisite intent at the time of commission of the acts giving rise to the indecent liberties charge, it does not follow that the jury had to necessarily find that he had that intent at the earlier time when he entered the Lane apartment.[13/]

13/ Stewart v. United States, 116 U.S.App.D.C. 411, 324 F.2d 443 (1963), appears to be to the contrary. As far as defendant knows, this case has never been followed on this point by this or any other court and should be confined to its special facts.

III. The Evidence Did Not Contain Sufficient Corroboration of "Corpus Delicti" to Support the Conviction on the Indecent Liberties Count.

The Government asserts that "appellant's attack on the prosecutrix was sufficiently corroborated" and refers to "appellant's assault on Patricia Miller." (brief, p. 14). But defendant was not charged with or convicted of an "attack" or an "assault." He was charged with taking indecent liberties with a minor and it was incumbent upon the Government to prove and corroborate "corpus delicti" with respect to the offense charged. As this court recently noted in Allison v. United States:

> "It is clear that corpus delicti in a given case consists of all the material elements of the crime charged." 14/

The defendant was charged in the indictment with taking

> " ... immoral, improper and indecent liberties with Patricia A. Miller ... with the intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the said Michael E. Workcuff."

The only proof offered to establish this charge was the hearsay statement of Patricia Miller that defendant attempted to pull down her underpants. Patricia's statement, if corroborated, would undoubtedly be sufficient to establish corpus delicti of the offense charged. But the record is

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14/ U.S.App.D.C. , 409 F.2d 445 (1969).

devoid of corroboration of the hearsay testimony that defendant tried to pull down Patricia Miller's underpants.

In support of its assertion that corpus delicti was sufficiently corroborated, the Government relies on evidence that shows:

1. defendant was in the apartment at the time of the alleged offense;
2. Patricia Miller suffered physical injury to her face and arm;
3. Patricia was emotionally upset;
4. defendant had opportunity to commit the alleged crime; and
5. Patricia made prompt complaint to both her family and the police.

The Government also asserts "the complete lack of any motive on the part of the prosecutrix to falsify" although the record is devoid of any evidence either way as to the possibility of a motive to falsify.[15/]

The defendant submits that, accepting the Government's characterization of the evidence, the evidence does

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[15/] Since Patricia Miller was not competent to testify it was not possible for defendant's counsel to subject her to cross-examination.

not offer the corroboration required. The evidence relied upon by the Government could only establish:

1. that defendant--contrary to his alibi defense--was in the Lane apartment at the time of the alleged offense; and
2. that Patricia was struck by someone, suffered physical injury as well as emotional distress, and promptly reported the alleged attack.

This evidence is corroborative of some parts of Patricia's statements but not of the part critical to the offense charged--the alleged attempt to pull down Patricia's underpants by the defendant.[16/]

As this court recently held in Allison v. United States, the fact that part of a complainant's testimony is corroborated is not sufficient unless there is "corroboration as to the material facts" of the offense charged.[17/]

16/ Rose Miller stated that Patricia "said that Michael had tried to pull down her underwears." (Tr. 75) Velma Hobbs testified that Patricia stated that Michael "tried to make her pull down her underpants." (Tr. 115)

17/ U.S.App.D.C. at , 409 F.2d at 450 (1969).

IV. The District Court's Judgment Should be Reversed even if Defendant's Conviction on One Count is Upheld

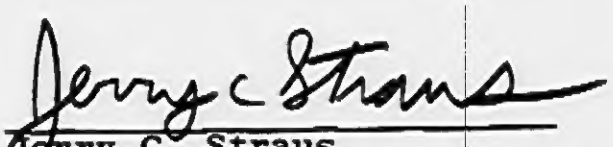
The Government has suggested (brief, p.11n.12, p.14) that since defendant received a general sentence of two to seven years the district court's judgment should not be disturbed if the conviction on either count is upheld. Kosmos v. United States, 111 U.S.App.D.C. 234, 296 F.2d 356 (1961). However, recent Supreme Court opinions have recognized that many adverse collateral consequences attach to any criminal conviction, with very real dangers of prejudice. See Benton v. Maryland, 395 U.S. 784, 790-91 (1969); Street v. New York, 394 U.S. 576, 579-80 n.3 (1969); Sibron v. New York, 392 U.S. 40,55 (1968); Carsfas v. La Vallee, 391 U.S. 234, 237-38 (1968); Ginsberg v. New York, 390 U.S. 629, 633-34 n.2 (1968) . Having but one conviction challenged should not preclude full review [see Benton v. Maryland, 395 U.S. 784 (1969)], and having but one conviction overturned should not entrench the original aggregate sentence. Since the sentence in this instance was not apportioned, this court has no means of ascertaining what portion of the total was intended by the trial court to bear upon each offense. Thus even if conviction on one count should be affirmed, a remand for resentencing should be made since the trial court, had it originally been confronted with but one conviction, might have imposed a less

lengthy sentence. Baber v. United States, 116 U.S.App.D.C. 358, 362, 324 F.2d 390, 394 (1963), cert. denied, 376 U.S. 972; Smith v. United States, 118 U.S.App.D.C. 235, 237, 335 F.2d 270, 272 (1964).

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed and the case remanded to the district court with directions to enter a judgment of acquittal on the third count of the indictment, and to grant defendant a new trial on the first count of the indictment or, in the alternative, to grant defendant a new trial on both counts of the indictment.[18/]

Respectfully submitted,



Jerry C. Straus
Counsel for Appellant
(Appointed by this Court)
1616 H. Street, N.W.
Washington, D.C.

October 16, 1969
WILKINSON, CRAGUN & BARKER
Kenneth F. Tworoger
Of Counsel

[18/] See defendant's main brief, p. 24.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was handcarried this 16th day of October to the United States Attorney, United States Court House, Washington, D.C.

Jerry C. Straus